Atlantic Veal & Lamb, Inc. *and* Knitgoods Workers' Union, Local 155, Union of Needletrades, Industrial & Textile Employees, AFL–CIO. Cases 29–CA–24484, 29–CA–24619, and 29–CA–24669

June 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On August 19, 2003, Administrative Law Judge D. Barry Morris issued the attached decision.* The Charging Party and General Counsel filed exceptions and supporting briefs, the Respondent filed cross-exceptions and a supporting brief, and the Charging Party and the Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified[3] and set forth in full below.

This case concerns events that occurred during the Union's efforts to organize the Respondent's employees in August and September 2001.[4] The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending employee Modesto (Cuidadano) Lora, by discharging employee Jeorge Ogando, and by failing to recall employee Franklyn Rosario. The judge further found that the Respondent violated Section 8(a)(1) of the Act by threatening employees with plant closure and discharge, as well as by interrogating employees. Finally, the judge dismissed the complaint allegations that the Respondent violated Section 8(a)(3) and (1) by discharging employee Cecilio (Leo) Soto and by laying off certain employees.

We agree with all of the judge's conclusions[5] except for his conclusion that the Respondent's failure to recall employee Franklyn Rosario violated Section 8(a)(3) and (1) of the Act. For the reasons discussed in section 1 below, we find that the General Counsel failed to meet his initial *Wright Line* burden of establishing that animus against union activities was a motivating factor in the failure to recall Rosario.

Further, in adopting the judge's conclusion that the Respondent violated Section 8(a)(3) by unlawfully discharging employee Jeorge Ogando, we do not adopt the judge's entire rationale. Specifically, we find, for the reasons discussed in section 2 below, that the Respondent had actual knowledge of, or suspected, Ogando's union activity based on a confluence of circumstances surrounding Ogando's discharge.

1. Franklyn Rosario was one of several employees whom the Respondent laid off between September 12 and 25 in response to the September 11 attacks on the World Trade Center. The judge found, and we agree,

* The record shows that Modesto (Cuidadano) Lora was suspended on Tuesday, August 21, 2001, and not September 22, as the judge stated on p. 5 of his decision. Similarly, the record shows that the incidents concerning Lora occurred in the month of August and not September, as the judge stated in pp. 5-6 of his decision.

[1] No exceptions were filed to the judge's dismissal of the complaint allegations that the Respondent created the impression of, or engaged in, surveillance in violation of Sec. 8(a)(1) of the Act.

[2] The Charging Party, the General Counsel, and the Respondent have each excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We have modified the judge's recommended Order to reflect all the violations found. We shall also modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997).

[4] All dates are 2001 unless otherwise indicated.

[5] We agree with the judge's conclusion that the Respondent met its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to show that it would have laid off certain employees between September 12 and 25 even in the absence of their union activity. Accordingly, we find it unnecessary to pass on the judge's conclusion that the General Counsel met his initial *Wright Line* burden of showing that the union activity of the laid-off employees was a motivating factor in the Respondent's decision to lay them off.

In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(1) and (3) by suspending employee Lora, we find that the judge did not err in finding the suspension unlawful despite the fact that the complaint alleged unlawful discharge and not suspension. "It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); see also *Cardinal Home Products, Inc.*, 338 NLRB No. 154, slip op. at 4 (2003) (judge properly found 8(a)(1) violation that was not alleged in the complaint where 8(a)(3) violation alleged and 8(a)(1) violation found both plainly focused on the same set of facts, the ultimate issue of the Respondent's motivation was the same in both instances, and the Respondent acknowledged that this issue was fully litigated at the hearing). Here, the Respondent does not deny that the issue of Lora's suspension was litigated fully at the hearing. Moreover, the ultimate issue of the Respondent's motivation in taking the adverse action against Lora is the same whether the Respondent was proven to have discharged Lora or to have merely suspended him. The judge thus acted within his discretion to find this violation based on the evidence adduced at the hearing.

that these layoffs, including the layoff of Rosario, were lawful. The judge also found, however, that the Respondent unlawfully failed to recall Rosario to 1 of the 21 new production positions that became available during the months of September to December. The judge reasoned that because Rosario was shown to have performed virtually all of the jobs that were being performed in the plant during his two stints of employment with the Respondent (the positions of deboner, cutter, trimmer, and packer), Rosario should have been recalled to one of the new positions that became available. We disagree with the judge's finding and analysis.

Fundamentally, the judge did not state any basis for his implicit finding that the General Counsel satisfied his initial *Wright Line* burden, and we are unable to discern a basis for such a finding on the evidence in this case. As the judge noted, the record does not reflect what the 21 new positions actually were, much less the skill levels or union sentiments of the employees who filled them. Further, the record shows that the Respondent recalled four of the employees laid off in September to the newly available positions, yet there is no evidence indicating why those employees were recalled and others such as Rosario were not.[6] Thus, even assuming arguendo that the record supports the judge's inference that at least one of the newly available positions was for a deboner, cutter, trimmer, or packer, this shows, at best, that the Respondent may have filled positions for which Rosario was qualified. There are, however, insufficient facts to show that the Respondent's animus against Rosario's union activity was a motivating factor in the decision not to recall him to any of those positions. We thus reverse the judge's finding that the Respondent unlawfully failed to recall Rosario.

2. We agree with the judge's findings that the General Counsel established under *Wright Line* that Jeorge Ogando's union activity was a motivating factor in the Respondent's decision to discharge him, and that the Respondent failed to show that it would have discharged Ogando even in the absence of his union activity. In agreeing that the General Counsel met his initial burden under *Wright Line*, we find that there is sufficient evidence to support the finding that the Respondent at least suspected Ogando's involvement with the Union.[7]

The Board has found that the knowledge element of the General Counsel's initial burden may be satisfied by evidence of the surrounding circumstances, including contemporaneous 8(a)(1) violations, the timing of the alleged discriminatory action, and the pretextual nature of the reasons advanced by the respondent for the action taken. See, e.g., *Metro Networks*, 336 NLRB 63, 65 (2001). Such circumstances surround Ogando's discharge.[8] The Respondent discharged Ogando on the same day it unlawfully interrogated him. Further, these actions occurred within the context of additional contemporaneous 8(a)(1) violations committed by the Respondent. In addition, the Respondent advanced false reasons for its decision to discharge Ogando. We find that these circumstances support a finding that the Respondent suspected Ogando's union activity.

First, Ogando was unlawfully interrogated by his supervisor, Eddie Cruz, on the same day that the Respondent terminated Ogando. Ogando requested and was granted a 6 a.m. to 2:30 p.m. schedule at the start of the summer of 2002 to allow him to attend school in the afternoons. Prior to that change, Ogando's hours had been 7 a.m. to 3:30 p.m. On the morning of August 27, Cruz told Ogando he was imposing a sudden change in Ogando's scheduled hours to a 9 a.m. to 5 p.m. schedule. This change, as the Respondent well knew, compelled Ogando to choose between continuing to work for the Respondent and continuing to go to school. Fifteen minutes after this conversation, Ogando approached Cruz and asked him, "[D]o you want to fire me?" Cruz responded, "[N]o," and then asked Ogando if he had left work early the previous Friday to attend the union meeting at the Cafeta Restaurant.[9] Ogando told the Respondent's owner, Phillip Peerless, that he would report to work under the new schedule the following day. Nevertheless, the Respondent discharged Ogando that same afternoon, telling him that "it was time to part ways." The timing of these events all in the same day—the Respondent's sudden and unexplained change of Ogando's hours, its unlawful interrogation of him and his nearly

[6] Again, the record is devoid of evidence of the employees' comparative skill levels. It bears noting, however, that each of the four recalled employees was named in the complaint as having engaged in union activity.

[7] *Respond First Aid*, 299 NLRB 167, 169 fn. 13 (1990), enfd. mem. 940 F.2d 661 (6th Cir. 1991) ("The Board and the courts have long held that when the General Counsel proves an employer suspects discriminatees of union activities, the knowledge requirement is satisfied."). Because we find the knowledge requirement satisfied as to Ogando, we find it unnecessary to pass on the judge's reliance on *Link Mfg. Co.*, 281 NLRB 294 (1986), in finding that the General Counsel satisfied his initial *Wright Line* burden.

[8] Chairman Battista does not believe that the General Counsel can establish one element of the *Wright Line* initial burden, e.g., knowledge, by showing the other elements, e.g., union activity and animus. However, he agrees that in this case, as discussed infra, the circumstances concerning the timing of the discharge and the pretextual reason advanced for it show that the Respondent suspected that Ogando supported the Union and that this suspicion was a motivating factor in the Respondent's decision to discharge him. Therefore, he agrees that the General Counsel has met his burden under *Wright Line*.

[9] Ogando replied that he had not attended the meeting.

simultaneous discharge, despite Ogando's acceptance of the change—provides ample evidence for finding that the Respondent suspected Ogando's union activity. *Meyers Transport of New York, Inc.*, 338 NLRB No. 144, slip op. at 14 (2003); *Abbey's Transportation Services*, 284 NLRB 698, 700 (1987), enfd. 837 F.2d 575 (2d Cir. 1988).

Second, the Respondent gave false reasons for Ogando's discharge. In rejecting the Respondent's asserted business reasons for changing Ogando's hours and ultimately discharging him, the judge did not credit Cruz' testimony that the change was necessary because the employee who took over the day's end inventory from Ogando was not performing it properly and because Ogando told Cruz he "didn't want to do the hours."[10] Ogando's hours were changed, without explanation, to hours that neither he nor anyone in his department had worked before. Further, within a week after Ogando left the Respondent's employ, the Respondent switched the hours of Francis Marte to Ogando's former schedule of 6:30 a.m. to 2:30 p.m. Additionally, the judge credited Ogando's testimony that he accepted the new schedule that the Respondent imposed on him. The judge found that Ogando told Peerless that he would report to work the following day in accordance with the new schedule. Thus, the Respondent's assertion of false reasons for the change in Ogando's schedule and for Ogando's ultimate discharge support the finding that the Respondent suspected Ogando's union activity. *Abbey's Transportation Services*, supra at 700; *Meyers Transport of New York, Inc.* supra, slip op. at 14.

Finally, the unlawful interrogation and discharge of Ogando occurred against the backdrop of other unlawful conduct by the Respondent in the same time period. It is undisputed that the Respondent knew of the Union's organizational campaign that began in August 2001. By the time of Ogando's discharge on August 28, the Respondent's unlawful response to that campaign was already underway. As the judge found, on August 21, the Respondent unlawfully suspended Modesto (Cuidadano) Lora for his union activity. On August 31, the Respondent unlawfully threatened employees that if the Union "came in," the Respondent would "close the business and move to Indiana," and that if the employees "continue this idea about the Union," the Respondent "was going to close the company as [the Respondent] had done on other previous occasions." It was also during this period that Supervisor Hector (Rafael) Lopez unlawfully interrogated employee Juan Moreno after he signed an authorization card, asking him what he "knew about the Union," telling him that he "shouldn't get into this" and to "advise the other employees not to join the Union," and warning him that the job "was too close to my house to lose it that easily."

All of these unlawful acts took place within days of Ogando's discharge. This convergence of events in such a short period of time—the Respondent's unlawful suspension of Lora, followed by the Respondent's unlawful threats of plant closure and the unlawful interrogation of Moreno—lends further support to the conclusion that the Respondent suspected Ogando's union activity.

In sum, the evidence of (1) the Respondent's specific conduct towards Ogando (imposing a schedule on him that the Respondent knew conflicted with his school commitment and interrogating and ultimately discharging him even after he said he would accept the change in hours); (2) the Respondent's asserted false reasons for the discharge; and (3) the timing of events (the proximity between Ogando's interrogation, discharge, and the additional 8(a)(1) and (3) violations found) constitutes sufficient evidence upon which to find the Respondent suspected Ogando's union activity. Inasmuch as the elements of knowledge and animus have been satisfied, and as the Respondent's defenses have been shown to be mere pretexts, we conclude, in agreement with the judge, that the Respondent discharged Ogando in violation of Section 8(a)(3) and (1) of the Act.

3. Our dissenting colleague complains that the judge did not set forth a basis for his credibility resolutions. In this regard, he relies on 5 U.S.C. § 557(c) of the Administrative Procedures Act (APA). However, that section requires only that there be a basis for findings of fact. A demeanor-based credibility resolution is itself a basis for a finding of fact. There is no APA requirement that there be a subexplanation of the demeanor-based credibility resolution.

Our colleague acknowledges that there are many cases where a judge bases his or her of fact on a demeanor-based credibility resolution, and the Board affirms under *Standard Dry Wall*. Our colleague cites no cases where a court has reversed the Board in these cases.

Having said all of that, we believe that it would be far better for judges to give a more specific basis for a demeanor-based credibility resolution. This could include, for example, nervousness of the witness, self-contradiction, evasiveness, etc. We strongly encourage all of our judges to follow this better practice. However, we find the record is sufficient in order for us to make our findings in this case.

[10] The judge did not separately find that the change in Ogando's hours was discriminatorily motivated, and there are no exceptions on this point. However, the judge rejected, as we do, the Respondent's defenses that the change was justified and that Ogando refused to perform those hours.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Atlantic Veal & Lamb, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with plant closure because of their activity on behalf of the Knitgoods Workers' Union, Local 155, Union of Needletrades, Industrial & Textile Employees, AFL–CIO, or any other labor organization.

(b) Threatening to discharge its employees because of their union activity.

(c) Coercively interrogating its employees concerning their union activity.

(d) Suspending and discharging employees because of their union activity.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jeorge Ogando full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Jeorge Ogando and Modesto Lora whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Jeorge Ogando and the unlawful suspension of Modesto Lora, and within 3 days thereafter notify them in writing that this has been done and that their unlawful discharge and unlawful suspension, respectively, will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 21, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 30, 2004

Robert J. Battista, Chairman

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

I join my colleagues in finding that the Respondent did not violate Section 8(a)(1) of the Act by soliciting grievances, and did not violate Section 8(a)(3) by laying off approximately 14 employees following the terrorist attacks in September 2001 and by thereafter failing to recall them.[1] The dismissal of these allegations is based either on the General Counsel's failure to meet his initial burden of proof or on specific documentary evidence Respondent submitted showing the decline in its business operations immediately after September 11.

However, contrary to my colleagues, I conclude that the judge failed to make sufficiently detailed credibility resolutions to satisfy the requirements of 5 U.S.C. §

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] For the reasons stated in the majority opinion, I join my colleagues in reversing the judge's finding that Respondent unlawfully refused to recall employee Franklyn Rosario.

557(c) of the Administrative Procedures Act and to permit meaningful review of his credibility assessments. Accordingly, I would remand to the judge those issues turning on credibility resolutions and direct him to explain his reasons for crediting or discrediting the testimony of certain witnesses. Specifically, I would remand for additional findings the complaint allegations that Respondent violated Section 8(a)(1) by interrogating employees and threatening them with discharge and plant closure, violated Section 8(a)(3) by suspending employee Modesto (Cuidadano) Lora, and violated Section 8(a)(3) by discharging employees Cecilio (Leo) Soto and Jeorge Ogando.

The judge premised his credibility resolutions on the "demeanor" of witnesses, but did not explain what in the witnesses' demeanor caused him to credit one witness over another. Rather, he simply included in the second paragraph of his decision a blanket statement that "[u]pon the entire record of the case, including my observation of the demeanor of the witnesses, I make the following: [findings]." All subsequent credibility resolutions in the decision lack an explanation of the demeanor-based indicia that influenced the judge. For example, in finding that Respondent unlawfully suspended employee Lora, the judge stated in part as follows:

> Lora signed the Union authorization card on September 18 and distributed seven additional cards. I credit Rosario's testimony that Rojas said that Lora and Soto were "the two persons that were talking to the employees to join the Union" and they "got fired because they were the head[s] . . . to get the employees to get in the Union." In addition, I credit Moreno's testimony that Rojas told several employees "not to let our minds get poisoned" by Lora and Soto. Based on the above I find that General Counsel has made a prima facie showing that protected conduct was a motivating factor in Respondent's decision.
>
> Respondent contends that Lora was suspended and was not terminated. In addition, Respondent contends that Lora was not given permission to be absent on Monday, September 20. While Lopez testified that he did not give Lora permission to be absent on Monday, I do not credit that testimony. Instead, I have credited Lora's testimony that when he asked Lopez for permission to be absent, Lopez replied, "no problem."
>
> Accordingly, I find that Respondent has not sustained its burden of showing that the "same action would have taken place even in the absence of protected conduct."

Nowhere, however, did the judge explain his reasons for determining that Lora was a credible witness while Lopez was not. Thus, we have no basis to truly respond to Respondent's credibility-based exceptions on determinative factual issues, such as whether Lopez granted Lora permission to take off work on September 20.[2]

Section 557(c) of the Administrative Procedures Act, 5 U.S.C. § 557, specifies that "all decisions . . . shall include a statement of . . . (A) findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law or discretion presented on the record." While the burdens on our administrative law judges are significant, and blanket introductory demeanor statements plainly more expedient, such statements simply do not allow for meaningful review because they do not articulate "the reasons or basis" for any specific credibility determination. Moreover, frequent use of such credibility "boilerplate,"[3] which is effectively unreviewable, may undermine the perceived fairness and integrity of the Board's hearing procedures.

Consequently, I am unable to resolve the exceptions filed by the General Counsel, the Charging Party, and the Respondent to the judge's findings concerning those 8(a)(1) and (3) allegations that turn on credibility determinations. I would therefore remand this case to the judge for reconsideration and issuance of a supplemental decision explaining the basis for crediting or discrediting the testimony of witnesses, whether on demeanor grounds or based on the actual content of the testimony offered.

Dated, Washington, D.C. June 30, 2004

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

[2] Similarly, in finding the Respondent lawfully discharged employee Soto, the judge failed to explain why he credited the testimony of the Respondent's official, Marty Weiner, that Soto waived a knife at Weiner. The judge merely stated that: "I credit Marty's testimony that Soto 'got excited' and shook his knife in Marty's face."

[3] Nearly identical witness demeanor language appears in six other decisions recently issued by the same judge. See *Westchester Iron Works Corp.*, Case 2–CA–31494, 2004 WL 1170021 (NLRB Div. of Judges May 21, 2004); *Inter-Regional Disposal & Recycling, a successor to Denville Disposal, t/a Carmine Forgione & Sons*, 341 NLRB No. 56 (2004); *International Bonded Couriers, Inc.*, Case 29–CA–25748, 2004 WL 67477 (NLRB Div. of Judges Jan. 8, 2004); *J. F. Kiely Construction Co.*, Case 22–CA–25376, 2003 WL 21466431 (NLRB Div. of Judges June 20, 2003): *Inter-Regional Disposal & Recycling, Inc.*, Case 22–CA–25305; 2003 WL 21423967 (NLRB Div. of Judges June 16, 2003; and *AMF Trucking & Warehousing, Inc.*, Case 22–CA–25263, 2003 WL 21190793 (NLRB Div. of Judges May 16, 2003).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten our employees with plant closure because of their activity on behalf of the Knitgoods Workers' Union, Local 155, Union of Needletrades, Industrial & Textile Employees, AFL–CIO, or any other labor organization.

WE WILL NOT threaten to discharge our employees because of their union activity.

WE WILL NOT coercively interrogate our employees concerning their union activity.

WE WILL NOT discharge or suspend our employees because of their union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights set forth above.

WE WILL**,** within 14 days from the date of the Board's Order, offer Jeorge Ogando full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jeorge Ogando and Modesto Lora whole for any loss of earnings and other benefits resulting from our discrimination against them, less any net interim earnings, plus interest.

WE WILL**,** within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Jeorge Ogando and the unlawful suspension of Modesto Lora, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful discharge and suspension, respectively, will not be used against them in any way.

ATLANTIC VEAL & LAMB, INC.

Haydee Rosario, Esq., for the General Counsel.
Don T. Carmody, Esq., for the Respondent.
Leila M. Maldonado, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City during 11 days of hearing commencing February 27, 2002, and concluding March 3, 2003. On charges filed on September 20, November 27, and December 18, 2001,[1] a consolidated complaint was issued on December 20, alleging that Atlantic Veal & Lamb, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on May 21, 2003. Upon the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, with its principal office and place of business in Brooklyn, New York, has been engaged in the wholesale distribution and sale of meat. It has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Knitgoods Workers' Union, Local 155, UNITE (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Respondent is in the business of processing, selling and distributing meat at its facility in Brooklyn, New York. Philip Peerless is the president of the corporation, Martin Weiner is secretary, and his son, Brian Weiner, is vice president. Joseph Saccardi is chief financial officer. The production operations are supervised by three individuals, Eddie Cruz, Hector (Rafael) Lopez, and Francisco (Jimmy) Rojas.

The company has approximately 100 production employees, whose categories are: "deboners," who remove the bone from the meat; "trimmers," who clean the meat and remove the fat; "cutters" or "choppers," who cut the calves in half; and slicing and packing employees. There are also several employees who do the inventory and fill the orders.

The union organizing campaign started in August 2001, when Modesto (Cuidadano) Lora encountered Marcelo and Wilson, two union organizers on the street, about a block away from Respondent's facility. On August 24, some of the employees met at the Cafeto Restaurant located near the plant to

[1] All dates refer to 2001 unless otherwise specified.

discuss the Union and sign authorization cards. No supervisors were present.

The complaint alleges that Lora was discharged on August 22, and that Cecilio (Leo) Soto and Jeorge Ogando were discharged on August 28. The attack on the World Trade Center occurred on September 11 (9/11). On September 12, Respondent laid off three employees. From September 13 to 25, it laid off an additional 11 employees. Respondent contends that the layoffs were necessary in light of the 9/11 attack.

2. Alleged discharge of Lora

Lora, a deboner, began his employment with Respondent in 1998. During August he and several coworkers met with Marcelo and Wilson, the union organizers, on the street near the plant. Several days later Marcelo came to Lora's home and gave him an authorization card. Lora signed the card at his home on August 18. Marcelo gave Lora seven cards, which he distributed to fellow employees.

Lora testified that on Friday, August 17, he asked Lopez for permission to be absent the following Monday to attend a meeting at the Social Security office. Lora testified that Lopez responded, "no problem." When he returned to work on Tuesday, August 21, Lora testified that Lopez told him not to start working but instead he should wait for Rojas. He testified that Rojas told him to "take a week's vacation." Lora then went to discuss the matter with Peerless. Lora testified that Peerless told him, "the conversation is over, go home." Lora then asked for documentation to be able to collect unemployment insurance. Lora testified that Peerless told him, "go or call on the phone and they will give it to you automatically."

Peerless testified that Lora was suspended for taking Monday off without permission. Respondent's position is that Lora was not terminated but instead "he walked out because he refused to accept a suspension." Lopez testified that on Sunday, August 19, Lora asked him for permission to be absent the next day. Lopez testified that he did not authorize Lora's absence.

Franklyn Rosario, a deboner who was laid off on September 12, testified that at a meeting of employees, one of the employees asked Rojas why Lora and Soto were fired. Rosario testified that Rojas replied that they were the "two persons that were talking to the employees to join the Union." Juan Moreno, a cutter and stripper, who was laid off on September 12, testified that at a meeting of several employees which he attended, Rojas told them "not to let our minds get poisoned by Cuidadano [Lora] and Leo [Soto] because they were already fired."

3. Alleged discharge of Soto

Soto, a deboner, began his employment with Respondent in 1998. He testified that he first heard about the Union on August 24, at which time he signed an authorization card.

He further testified that the following Monday, August 27, Lopez told him that "he was trying to get the Union inside the company" and that he should be "very careful with was I doing." Lopez told him that the Union "was not going to bring benefits into the company." Soto testified that at the same time both Lopez and Rojas told him they were going to "keep an eye on me" and that he was "Modesto's [Lora] right hand man over there."

Soto reported for work at 5:30 a.m. on Tuesday, August 28. He testified that after he punched in, Lopez and Rojas told him that Peerless "didn't want to see me in the company any more." Soto testified that nevertheless he went to the table and began deboning. Soon thereafter Marty Weiner appeared at the table. Soto testified that Marty told him to leave, he replied that he wouldn't, and Marty said that if he didn't leave he would call the police. Soto then left the plant.

Peerless testified that Soto was called off of the production line by human resources with respect to some documentation. Peerless stated that Soto was suspended because he refused to leave the production line. Rojas testified that Peerless told him that Soto needed to produce some "paperwork" and that if he doesn't comply "don't let him start to work in the morning." On August 28, Rojas told Soto that he couldn't start work unless he provided the information. Soto began work anyway. Rojas testified that he then contacted Marty. Marty approached the table and told Soto to leave. Rojas testified that Soto "got excited" and shook his knife "in Marty's face." Lopez testified that when Marty told Soto to leave Soto "got real mad" and "pulled his knife." Lopez and Rosario testified that Lopez left the plant before the police arrived.

Marty testified that when he arrived on Tuesday morning he saw that Soto was having an argument with Lopez. Marty told Soto to listen to Lopez, but instead Soto "started to walk toward me with his knife in his hand." Marty testified that he told Soto to put the knife down and "if you want to talk, I'll talk with you. I won't talk with a knife pointing." Marty stated that after telling Soto to put the knife down three times, and Soto refusing to do so, Marty called the police.

4. Alleged discharge of Ogando

Ogando began his employment with Respondent in 1998. He filled orders and did inventory under the supervision of Eddie Cruz. Originally his hours were 7 a.m. until 3:30 p.m. Because he was going to school, Ogando asked Cruz to change his hours to 6 a.m. until 2:30 p.m. The change was made in the beginning of the summer of 2001. Francis Marti also worked in the same department. Ogando signed a union authorization card on August 23.

On August 28, Cruz told Ogando that his work schedule was being changed to 9 a.m. to 5 p.m. Ogando testified that he told Cruz that he would not be able to attend school with that schedule. Ogando testified that he asked Cruz, "[D]o you want to fire me?" Ogando testified that after Cruz answered, "[N]o," Cruz asked him what time he left the previous Friday and if "I went to the Cafeto Restaurant."

Ogando testified that he then went to discuss the matter with Peerless, explaining to Peerless that the new schedule "wasn't going to work with my school schedule." Ogando testified that Peerless stated that "he couldn't do anything to help me." Ogando further testified that he asked Peerless what time he should start the next day to which Peerless replied, "from 9:00 to 5:00 the way Eddie told you." Ogando testified that he then told Peerless, "fine, we'll see each other tomorrow." Ogando further testified that at 3:30 that afternoon Cruz called him and told him "it was time to part ways and that he was going to give me layoff" and that he should return his keys.

Peerless testified that Ogando quit his job after he was told that his hours had been changed. Cruz testified that "things were not working out," the inventory was not being done correctly and orders were not being filled correctly. He testified that he told Ogando that the hours would have to be changed and that Ogando stated that because of school "he didn't want to do the hours." Cruz testified that after he told Ogando that he had to revert to his prior schedule, "the next day he didn't show up."

5. Plant closure

Rosario testified that on August 31, a meeting was held between several employees and Rojas and Lopez. Rosario testified that Rojas told the employees that "if the Union came in Phil [Peerless] would close the business and move to Indiana." Moreno corroborated this testimony. Ramon Diaz testified that at a meeting of all the employees held on August 31, Jimmy stated that "if we continue this idea about the union Philip was going to close the company as he had done on other previous occasions." Rojas testified that at a meeting with several employees he shared his feelings about the Union. He told them that he "wouldn't trust the union," that the Union promises many things and "then they don't to anything after they are there." He further testified that he felt this way because of his "previous experience" with the Union and he admitted that part of the "previous experience" was "when the company shut down and moved to Utica." He conceded that he discussed this with the employees.

6. Threats to discharge

Rosario testified that a meeting of employees was held on September 5. There were approximately 30 employees present along with Lopez and Rojas. Rosario testified that Rojas told the employees that "[if] Phil found out whoever was signing the cards for the Union, they would get fired." Rosario testified that Rojas again stated that Peerless would move the company "to Indiana." Moreno testified that at a meeting of all employees, Rojas said that the meeting was called to discuss the "consequences that arise from signing the card" and that the consequences were "that we could lose our jobs."

7. Interrogation

Moreno testified that after he signed the authorization card, he had a conversation with Rojas and Lopez in the coatroom. Lopez asked him "what I knew about the Union." Moreno responded that he "didn't know anything about that." As stated earlier, Ogando testified that Cruz asked him what time he left the plant on the Friday that the employees held a meeting at the Cafeto Restaurant and then asked, "[I]f I went to the Cafeto Restaurant."

8. Surveillance

Lora testified that after he was terminated he was passing out union authorization cards about a block away from the plant. He testified that Cruz was standing in the middle of the block "observing" him. He also testified that Marty Weiner "observed" him and that Rojas and Cruz were standing at one of the plant's exits, "observing" him. Peerless testified that there are cameras at each of the plant's entrances.

9. Layoffs

Rosario worked for Respondent from 1997 until 2000, at which time he was laid off. He was rehired in June 2001 and was laid off on September 12. He testified that he signed a union authorization card at the Cafeto Restaurant meeting and that no supervisors were present. He testified that during the afternoon of September 12, Lopez and Rojas told him that they were going to give him "layoff for two weeks because there wasn't enough work to do in the company." Rosario testified that while he was employed by Respondent he had worked as a deboner, a cutter, a trimmer, and a packer.

Moreno, a cutter and stripper, was hired by Respondent in December 1999 and was laid off on September 12. He signed a union authorization card on August 24, at the Cafeto Restaurant and testified that no supervisors were present. He testified that at 2 p.m. on September 12, Lopez told him, "[S]tay home for two weeks because work is slow."

Ramon Diaz, a warehouse worker, began his employment with Respondent in October 1998. He was laid off on September 12. He testified that during the afternoon of September 12, Rojas told him, "[G]o home because there was no work for me." Rafael Mora, a trimmer, worked for Respondent from December 1998 until the end of 1999. He started working there again in August 2001 and was laid off on September 12. The complaint lists the names of ten additional employees who were laid off between September 13 and 25. They did not testify. Notations on the employment records contained in the record as General Counsel's Exhibit 11 indicate that the following employees may have held the indicated positions: Pena-packer; Polanco-trimmer; McKensie-packer; and Vasquez-packer. General Counsel Exhibit 25 indicates that McKensie was a "helper." The record does not show what jobs the other laid-off employees held.

Attachments to General Counsel and Charging Party's briefs show that there were 21 employees newly hired after September 12. The record does not show what positions these employees were hired to fill.

B. Discussion and Conclusions

1. Alleged discharge of Lora

The complaint alleges that Respondent discharged Lora on September 22. Lora signed a union authorization card on September 18, and distributed seven cards to other employees. I credit his testimony that on Friday, September 17, he asked his supervisor, Lopez, for permission to be absent on Monday. Lopez told Lora, "no problem." When Lora returned to work on Tuesday, September 22, Rojas, another supervisor, told him to "take a week's vacation." Lora went to discuss the matter with Peerless, after which Peerless told him, "the conversation is over, go home." Peerless testified that Lora was not terminated, but instead was suspended for 1 week.

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board requires that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demon-

strate that the "same action would have taken place even in the absence of the protected conduct."

Lora signed the union authorization card on September 18, and distributed seven additional cards. I credit Rosario's testimony that Rojas said that Lora and Soto were "the two persons that were talking to the employees to join the Union" and they "got fired because they were the head[s] . . . to get the employees to get in the Union." In addition, I credit Moreno's testimony that Rojas told several employees "not to let our minds get poisoned" by Lora and Soto. Based on the above I find that General Counsel has made a prima facie showing that protected conduct was a motivating factor in Respondent's decision.

Respondent contends that Lora was suspended and was not terminated. In addition, Respondent contends that Lora was not given permission to be absent on Monday, September 20. While Lopez testified that he did not give Lora permission to be absent on Monday, I do not credit that testimony. Instead I have credited Lora's testimony that when he asked Lopez for permission to be absent, Lopez replied, "no problem." Accordingly, I find that Respondent has not sustained its burden of showing that the "same action would have taken place even in the absence of the protected conduct."

With respect to Respondent's contention that Lora was not terminated, Lora testified that on September 21, at a meeting with Rojas and Lopez, he was told, "they wanted to give me one week as punishment." He testified that Rojas told him "take a week's vacation." Peerless testified that Lora was suspended and Respondent's position is that he was not terminated. While Rosario testified that a meeting on August 31, he was told that Lora was "fired" because he was one of the "head[s]" to get the employees in the Union, there is no indication that Lora was told prior to the end of the 1-week suspension that he was "fired." Accordingly, I find that Lora was given a 1-week suspension because of his union activities, in violation of Section 8(a)(1) and (3) of the Act.

2. Alleged discharge of Soto

Soto signed a union authorization card on August 24. I credit his testimony that on Monday, August 27, Lopez told him that "he was trying to get the Union inside the company" and that he should be "very careful with what I was doing." I further credit his testimony that Lopez and Rojas told him that they were going to "keep an eye on me" and that he was Lora's "right hand man." As discussed previously, I have found that Rojas told Rosario that Lora and Soto were the "head[s]" to get the employees in the Union. I credit Soto's testimony that on Tuesday, August 28, after he punched in, Lopez and Rojas told him that Peerless "didn't want to see me in the company any more." Soto was discharged that day. Pursuant to *Wright Line*, supra, I find that General Counsel has made a prima facie showing that protected conduct was a motivating factor in Respondent's decision to discharge Soto.

Peerless told Rojas that Soto needed to produce some documentation and that if he doesn't produce it, Rojas should not let Soto begin work on Tuesday, August 28. On Tuesday morning, when Soto appeared for work, Rojas told him that he couldn't start work unless he provided the information. Soto started to work anyway. Rojas then contacted Marty Weiner. Marty approached the table where Soto was working and told him to leave. I credit Marty's testimony that Soto "got excited" and shook his knife in Marty's face. Marty told Soto to put the knife down but Soto didn't comply. After telling Soto to put the knife down three times, and Soto having refused, Marty called the police. Soto left the plant before the police arrived.

I find that Respondent has satisfied its burden under *Wright Line*, supra, of showing that Soto would have been discharged even in the absence of his union activity. As Marty Weiner testified, the knife was 13 inches long, it was "threatening" and "dangerous" and wielding such a knife is a dischargeable offense. Accordingly, the allegation is dismissed.

3. Alleged discharge of Ogando

Ogando signed a union authorization card at home on August 23. He did not attend the union meeting at the Cafeto Restaurant. No showing has been made in the record that Respondent knew that he signed the card or that he engaged in any activity on behalf of the Union. General Counsel's brief states that Respondent engaged in "nip in the bud" tactics. Apparently it is General Counsel's theory that Respondent discharged or laid off employees even though their union activities, if any, were not known to Respondent to "nip in the bud" the impending unionization. In this connection, the Board's decision in *Link Mfg. Co.*, 281 NLRB 294 (1986), is instructive. The Board stated (id. at 299 fn. 8):

> Although several of the laid-off employees had signed cards and engaged in union activities, it is unnecessary to the finding of discrimination that the Respondent specifically knew of the union activities of each of the discriminatees. . . . The Respondent's reaction was thus in the nature of a "power display" in response to the advent of the Union and was unlawful without regard to specific knowledge of the prounion activities of particular employees.

Until the summer of 2001 Ogando's hours were 7 a.m. until 3:30 p.m. Because he was attending school Ogando asked his supervisor, Cruz, if his hours could be changed to start at 6 a.m. and finish at 2:30 p.m. Cruz agreed to the change. On August 28, Cruz told Ogando that his schedule was being changed to 9 a.m. to 5 p.m. Ogando told Cruz that he would not be able to continue going to school with the new schedule. Cruz then asked Ogando whether he attended the union meeting at the Cafeto Restaurant the previous Friday. Ogando replied that he had not attended.

Ogando subsequently discussed the matter with Peerless. Peerless told Cruz that he would have to comply with the new schedule and to report the next day at 9 a.m. I credit Ogando's testimony that he told Peerless "fine, we'll see each other tomorrow." Later that afternoon Cruz telephoned Ogando and told him "it was time to part ways." In light of *Link Mfg. Co.*, supra, I find that General Counsel has made a prima facie showing that protected conduct was a motivating factor in Respondent's decision to discharge Ogando.

Cruz testified that he changed Ogando's hours because the inventory was not being done correctly and the orders were not being filled correctly. While Cruz testified that he changed Ogando's hours back to what they were, I credit Ogando's tes-

timony that his hours had been 7 a.m. until 3:30 p.m. Indeed, I credit Ogando's testimony that the employees in his department did not work from 9 a.m. to 5 p.m. and that after Ogando's discharge, Marti's hours were changed back to 6 a.m. to 2:30 p.m. I find that Respondent has not sustained its burden of showing that Ogando would have been discharged were it not for the union campaign. Accordingly, I find that Respondent discharged Ogando in violation of Section 8(a)(1) and (3) of the Act.

4. September layoffs

Fourteen employees were laid off between September 12 and 25. No showing has been made that Respondent was aware whether any of these employees had signed union authorization cards or whether they had done anything in support of the Union. Instead, General Counsel's theory is that Respondent intended to "nip in the bud" the organizing campaign. As previously discussed, in view of *Link Mfg. Co.*, supra, I find that General Counsel has made a prima facie showing that protected conduct was a motivating factor in Respondent's decision to lay off the employees.

Respondent contends that the layoffs were necessary because of the 9/11 attack on the World Trade Center. Saccardi testified that after the first reports of the attack he and Peerless discussed that they were going to be "seriously affected by a catastophe of this scope." Peerless testified, "[A] lot of our businesses, restaurant related, airline related, cruise ships related, hotel related, when the World Trade Center went down I think it was fairly well documented that the restaurants, the airlines, the cruise ships, all of those industries suffered tremendously and they cut back on their buying."

The record shows that in August 2001, 6020 calves were purchased. This decreased to 5595 calves purchased in September, a loss of 7 percent. In October, 5190 calves were purchased. This represented a decrease of 14 percent from the August purchases. The record further shows that for the month of September 2000, 6364 nature calves[2] were killed. In September 2001 the corresponding figure was 4755 calves, a decrease of 25 percent. For the month of October 2000, 6883 nature calves were killed. The corresponding figure for October 2001 was 5613 calves, a decrease of 18 percent.

In view of the above, I believe that Respondent has satisfied its *Wright Line* burden of showing that the "same action would have taken place even in the absence of the protected conduct." Accordingly, the allegation is dismissed.

5. Failure to recall

The complaint alleges that, with the exception of Jose Hernandez, Respondent has failed to recall the laid-off employees. Only four of the laid-off employees testified. During the time that Rosario worked at the plant, he worked as a deboner, a cutter, a trimmer, and a packer. Moreno was a cutter and stripper. Diaz was a warehouse worker and Mora was a trimmer. After September 12, there were 21 newly hired employees. The record does not show what positions these employees held.

In order to show that an employer has failed to recall a laid-off employee it must be demonstrated that a job was filled which should otherwise have been offered to the laid-off employee. Inasmuch as Rosario had been a deboner, cutter, trimmer, and packer, he had basically performed all of the jobs that were being performed in the plant. Thus, even though the record does not show what jobs the 21 new employees were hired for, clearly at least one of the positions was for a deboner, cutter, trimmer, or packer. I find, therefore, that Respondent has violated the Act by not recalling Rosario. As to the other laid-off employees, no showing has been made that jobs became available which were the same jobs which they previously performed. Accordingly, with respect to the laid-off employees other than Rosario, the allegation is dismissed.

6. Plant closure

The complaint alleges that Respondent violated the Act by threatening employees with plant closure if they selected the Union as their collective-bargaining representative. I credit Rosario's testimony that on August 31, Rojas told employees that if the Union "came in" Peerless would "close the business and move to Indiana." This was corroborated by Moreno. I also credit the testimony of Diaz that Rojas told employees that "if we continue this idea about the Union," Peerless "was going to close the company as he had done on other previous occasions." Accordingly, I find that Respondent has violated the Act by threatening plant closure if the employees select the Union as their collective-bargaining representative. See *Quality Aluminum Products*, 278 NLRB 338 (1986), enfd. 813 F. 2d 795 (6th Cir. 1987).

7. Threats to discharge

I credit Rosario's testimony that on September 5, Rojas told employees that if Peerless found out who was "signing the cards for the Union, they would get fired." I also credit Moreno's testimony that at a meeting of employees Rojas said that a consequence of signing the union authorization cards would be that "we could lose our jobs." I find that through such statements Respondent threatened loss of jobs for supporting the Union, in violation of Section 8(a)(1) of the Act.

8. Interrogation

The complaint alleges that Respondent interrogated its employees about their union activities. I credit Moreno's testimony that Lopez asked him "what I knew about the Union." I also credit Ogando's testimony that Cruz asked him if he had attended the union meeting at the Cafeto Restaurant. I find that these questions constitute unlawful interrogation, in violation of Section 8(a)(1) of the Act.

9. Surveillance

The complaint alleges that Respondent created the impression of, and engaged in surveillance, in violation of the Act. Lora testified that after he was terminated he was passing out union authorization cards about a block away from the plant. He testified that Cruz was standing in the middle of the block "observing" him. Lora did not testify what the "observing" consisted of. He simply testified to the conclusory statement that Cruz was "observing" him. Lora also testified that Marty Weiner "observed" him and that Rojas and Cruz were standing

[2] BOB calves are newborn calves. Nature calves are approximately 24 weeks old before they are slaughtered. The bulk of Respondent's purchases are nature calves.

at one of the plants exits, "observing" him. Again, no details were given as to what the "observing" consisted of. I do not credit this testimony, and find that General Counsel has not sustained her burden of proof. In addition, General Counsel elicited testimony from Peerless that there was a security camera at each of the plant's exits. If this testimony was intended to show unlawful surveillance, it shows no such thing. There is no indication that the cameras served any purpose other than for security. Accordingly, I find that General Counsel has not shown by a preponderance of the evidence that Respondent engaged in unlawful surveillance or created the impression of surveillance. The allegation is therefore dismissed.

10. Other allegations

General Counsel has moved to withdraw the allegation that Respondent ceased giving Soto a free ride to work and that James Fischer was one of the unlawfully laid-off employees. The motion is granted and the allegations are withdrawn.

At the hearing General Counsel amended the complaint to allege that Rojas and Lopez unlawfully solicited grievances. Rosario testified that at a meeting of approximately 60 employees he and two other employees asked Rojas why they had not gotten raises. Rojas explained to them why they had not gotten raises. I find that General Counsel has not shown that Respondent solicited grievances or that there was a promise or an implied promise to confer benefits. The testimony merely shows that several employees, on their own, asked why they had not received raises. Not only did Rojas not promise them raises, but he told Rosario that "I should be lucky they took me back to work." I find that General Counsel has not shown that Respondent solicited grievances in violation of the Act. Accordingly, the allegation is dismissed. See *Bakersfield Memorial Hospital*, 315 NLRB 596, 600 (1994).

The complaint alleges that Respondent unlawfully refused to pay Ogando for work performed the last day of his employment, September 28. Ogando punched in on September 28, and worked the full day. However, he did not punch out. Respondent contends that he wasn't paid for that day because he didn't punch out. I do not believe that Respondent has sustained its burden under *Wright Line*, supra, of showing that under similar circumstances an employee who has worked the day but did not punch out isn't paid. Accordingly, I find that Respondent violated the Act by refusing to pay Ogando for the hours he worked on September 28. Inasmuch as I am ordering backpay for Ogando, the backpay period shall include September 28.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening plant closure, by threatening to discharge employees because of their union activities, and by interrogating employees concerning their union activities, Respondent has violated Section 8(a)(1) of the Act.

4. By suspending and discharging employees for protected activity, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. By failing to recall a laid-off employee because of protected activity, Respondent has violated Section 8(a)(1) and (3) of the Act.

6. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent did not violate the Act in any other manner alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having unlawfully discharged Jeorge Ogando, I shall order Respondent to offer him immediate and full reinstatement to his former position, or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. In addition, Respondent having unlawfully suspended Modesto Lora and having unlawfully failed to recall Franklyn Rosario, I shall order Respondent to make whole Lora for the 1-week suspension and make whole Ogando and Rosario for any loss of earnings they may have suffered. Ogando's backpay period shall commence September 28, and extend until Respondent's offer of reinstatement. Rosario's backpay period shall commence on the date a position as deboner, cutter, trimmer, or packer became available, and extend until the date he is recalled by Respondent. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Atlantic Veal & Lamb, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening plant closure, threatening to discharge employees because of their union activities, and interrogating employees concerning their union activities.

(b) Suspending and discharging employees because they engaged in protected activities.

(c) Failing to recall laid-off employees because they engaged in protected activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Jeorge Ogando immediate and full reinstatement to his former position, or if such position no longer exists, to a

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings, with interest, in the manner set forth in the remedy section of this decision.

(b) Make whole Modesto Lora for his 1-week suspension, with interest.

(c) Recall Franklyn Rosario and make him whole for any loss of earnings, with interest, for the period beginning on the date a position as deboner, trimmer, cutter, or packer became available until the date of his recall.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and suspension, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge or suspension will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility located at 275 Morgan Avenue, Brooklyn, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 22, 2001.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 19, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten plant closure, threaten to discharge employees because of their union activities, or interrogate them concerning such activities.

WE WILL NOT suspend, discharge, or fail to recall employees because they engage in protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jeorge Ogando full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings, with interest.

WE WILL make Modesto Lora whole for any loss of earnings resulting from his 1-week suspension, plus interest.

WE WILL recall Franklyn Rosario and make him whole for any loss of earnings, with interest, for the period beginning on the date a position as deboner, trimmer, cutter, or packer became available until the date of his recall.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Ogando and suspension of Lora, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharge and suspension will not be used against them in any way.

ATLANTIC VEAL & LAMB, INC.